APPEAL NO. 050478
FILED APRIL 13, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on February 2, 2005. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the second and third quarters. The claimant appealed, contending that she made a good faith effort to obtain employment commensurate with her ability to work by searching for employment and by being employed. The claimant also contends that Sections 408.141 through 408.147 are unconstitutional. No response was received from the respondent (carrier).

DECISION

Reversed and remanded.

The claimant contends that Sections 408.141 through 408.147 pertaining to SIBs are unconstitutional. Administrative agencies have no power to determine the constitutionality of statutes. Texas State Board of Pharmacy v. Walgreen Texas Co., 520 S.W.2d 845 (Tex. Civ. App.-Austin 1975, writ ref'd n.r.e.). The constitutionality of the 1989 Act was upheld in Texas Workers' Compensation Commission, et al. v. Garcia, 893 S.W.2d 504 (Tex. 1995).

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The parties stipulated that the claimant sustained a compensable injury; that she reached maximum medical improvement with a 30% impairment rating; that she did not elect to commute any portion of her impairment income benefits; that the qualifying period for the second quarter was from January 4 through April 3, 2004; that the second quarter was from April 17 through July 16, 2004; that the qualifying period for the third quarter was from April 4 through July 3, 2004; and that the third quarter was from July 17 through October 15, 2004. There is no appeal of the hearing officer's determination that the claimant's underemployment and unemployment were a direct result of her impairment. The SIBs criterion in issue is whether during the qualifying periods for the second and third quarters the claimant attempted in good faith to obtain employment commensurate with her ability to work.

The claimant relies on her job search and employment during the relevant qualifying periods to establish good faith. Rule 130.102(d)(1) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has returned to work in a position which is relatively equal to the injured employee's ability to work. Rule 130.102(d)(5) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has provided

sufficient documentation as described in Rule 130.102(e) to show that he or she has made a good faith effort to obtain employment. Rule 130.102(e) provides that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts, and that in determining whether or not the injured employee has made a good faith effort to obtain employment under subsection (d)(5), the reviewing authority shall consider the information provided from the injured employee, which may include, but is not limited to information listed in subsection (e)(1)-(11).

The claimant's testimony was somewhat confusing regarding dates, however, she indicated that she began working for the (employer L) in October or November 2003 as a sewing machine operator; that she last worked for employer L on May 28, 2004, when she was laid off; that the reason she was laid off was because she could no longer perform her job due to her leg hurting (according to the claimant's testimony and a medical report, the compensable injury includes an injury to her left knee); that the doctor who operated on her knee said that she could work 5 hours per day, 25 hours per week; that she worked 25 hours per week; that she also looked for other work during the relevant qualifying periods; that she earned $5.15 per hour at employer L; and that she is currently working 30 hours per week for another employer. When the claimant was initially asked whether she was paid every 2 weeks by employer L, she said "no, every week," but then said "I think it was every two weeks."

On her Application for [SIBs] (TWCC-52) for the second quarter, the claimant listed total wages of $1,400.80, which included seven wage payments during the qualifying period for the second quarter, and listed four job searches during the 11th week of the qualifying period, but none during the other weeks of the qualifying period. In her TWCC-52 for the third quarter, the claimant listed total wages of $1,125.28, which included five wage payments, but the first wage payment is also the last wage payment dated April 1, 2004, for the second quarter. Thus, wages listed for the third quarter qualifying period were actually $919.28, which included four wage payments during the qualifying period for the third quarter. The claimant also listed on her TWCC-52 for the third quarter 43 job contacts, with no job searches listed for the second, third, and fourth weeks of the qualifying period. There are wage statements from employer L attached to the TWCC-52's for the second and third quarters that state "Contract Labor," identify the claimant as the payee, and provide an amount and a date. The wage statements do not state the hours worked or the pay period. In a report dated December 23, 2003, which was just prior to the beginning of the qualifying period for the second quarter, (Dr. Z), a required medical examination doctor, wrote under the section "Work status and work restrictions," that "She can continue in the job that she is doing now, which keeps her at a sewing machine about five hours a day. She works from 4:00 o'clock to 9:00 o'clock everyday." Dr. Z added "She can probably increase that by an hour, but there should not be a great deal of walking associated with her job."

In the Background Information section of the decision, the hearing officer wrote that during the qualifying periods for the second and third quarters, the claimant earned some wages during a portion of the qualifying periods; that the claimant acknowledged that she did not work every week of the qualifying periods; that the evidence was insufficient to establish that the claimant complied with Rule 130.102(d)(1) during the qualifying periods; that the testimony and evidence established that the claimant did not return to work in a position relatively equal to the claimant's ability to work during the qualifying periods; and that the evidence established that during the qualifying period for the second quarter, the claimant worked 7 out of the 13 weeks and that during the qualifying period for the third quarter, she worked approximately 8 weeks of the 13 weeks. The hearing officer further stated that the claimant failed to sufficiently and persuasively explain why she did not work during the entire second and third quarters; that the claimant testified that she was released to return to work 5 hours per day, 5 days a week; that the claimant failed to establish that she was actually working 5 hours per day during every week of the qualifying periods; that the claimant failed to establish that she had an inability to work during the weeks she did not work and, therefore, she was required to look for work and the evidence established that the claimant did not seek employment during every week of the qualifying periods.

With regard to the qualifying periods for the second and third quarters, the hearing officer found that the claimant "did not return to work in a position relatively equal to her ability to work during a portion of the qualifying period," that the claimant did not make a good faith effort to obtain employment commensurate with her ability to work, and that the claimant did not seek work during every week of the qualifying periods. The hearing officer concluded that the claimant is not entitled to SIBs for the second and third quarters. The claimant contends that she made a good faith effort based on her employment and job searches.

Although not noted in the hearing officer's decision or at the CCH, we note that in Teague v. Insurance Company of the State of Pennsylvania, 144 S.W.3d 607 (Tex. App-Amarillo 2004, no pet.), the court considered the requirements of Rule 130.102(d) and (e) regarding the good faith effort to obtain employment and held that under Rule 130.102(e), the claimant, in order to satisfy the good faith effort criterion necessary to maintain qualification for SIBs, was obligated to search every week for work commensurate with her ability to work, and that she did not do so disqualified her as a matter of law for such benefits for the affected quarter. In Texas Workers' Compensation Commission Appeal No. 041812-s, decided September 16, 2004, the Appeals Panel determined that the Teague case was inapplicable to a case wherein the claimant was found to have met the good faith requirement under Rule 130.102(d)(2) (enrolled in, and satisfactorily participated in, a full-time vocational rehabilitation program sponsored by the (Company)). In Appeal No. 041812-s, the Appeals Panel noted that the Teague case concerned the application of the "every week" requirement of Rule 130.102(e), and did not consider the exception at the beginning of Rule 130.102(e) which states "[e]xcept as provided in subsection (d)(1), (2), (3), and (4) of this section . . . ." The Appeals Panel stated that "[w]e do not read Teague to say that the only way to meet the good faith effort to obtain employment is to comply with Rule

130.102(e) and ignore the exceptions at the beginning of that subsection." Thus, in the instant case, while the Teague case would be applicable to the claimant's assertion of a good faith job search under Rule 130.102(d)(5) and (e), it would not be applicable to her assertion that she met the good faith criterion under Rule 130.102(d)(1) for the same reasons the Teague case was held to be inapplicable to Rule 130.102(d)(2) in Appeal No. 041812-s.

With regard to Rule 130.102(d)(1), which provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has returned to work in a position which is relatively equal to the injured employee's ability to work, the Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 001579, decided August 17, 2000, that:

> The claimant, however, relies on Rule 130.102(d)(1) to meet the good faith job search requirement. That provision establishes that a claimant who has returned during the qualifying period to a position relatively equal to his ability to work has made the required good faith job search. In Texas Workers' Compensation Commission Appeal No. 000321, decided March 29, 2000, we observed that Rule 130.102 creates various ways to fulfill the good faith job search requirement and that subsection (d)(1) does not require that the claimant must work in this position during each week of the filing period or otherwise document a job search in those weeks that claimant did not work.

In Texas Workers' Compensation Commission Appeal No. 032127, decided October 1, 2003, the Appeals Panel stated: "we have held that if the claimant complies with Rule 130.102(d)(1) during any portion of the qualifying period, that will satisfy the good faith requirement of Section 408.142(a)(4) and Rule 130.102(b)(2)."

In the instant case, the hearing officer did not make an explicit finding that the claimant returned to work in a position relatively equal to her ability to work during either of the qualifying periods. The hearing officer did find with regard to both qualifying periods that "Claimant did not return to work in a position relatively equal to her ability to work during a portion of the qualifying period." That finding is somewhat ambiguous in that it may mean that the hearing officer was finding that the claimant did return to work in a position relatively equal to her ability to work, but for only part of the qualifying period, and not during another portion of the qualifying period, or it may mean that the hearing officer found that the claimant did not return to work in a position relatively equal to her ability to work during any portion of the qualifying period. Based on the hearing officer's statements in the Background Information section of her decision, it appears that the hearing officer believed that the claimant needed to establish that she returned to work in a position relatively equal to her ability to work during every week of the qualifying period in order to meet the good faith criterion under Rule 130.102(d)(1),

which is inconsistent with our decisions in Appeal Nos. 001579, 000321, and 032127, *supra*.

In addition, it appears from the Background Information section of the hearing officer's decision that the hearing officer may have thought that if the claimant were to establish that she returned to work in a position relatively equal to her ability to work during a portion of the qualifying period, but not during another portion of the qualifying period, the claimant would also have to document a job search during that portion of the qualifying period that she had not returned to work in a position relatively equal to her ability to work, which would be inconsistent with Appeal Nos. 001579 and 000321, *supra*.

Another matter that is problematic in reviewing the hearing officer's decision is that the hearing officer states that the claimant worked 7 out of the 13 weeks in the qualifying period for the second quarter. The claimant corrected herself at the CCH and indicated that employer L paid her every 2 weeks, which is consistent with the dates on the seven wage statements in evidence for the second quarter qualifying period, which are two weeks apart. The hearing officer accepted the claimant's testimony regarding being paid every 2 weeks by employer L when discussing the qualifying period for the third quarter because the hearing officer states that the claimant worked approximately 8 weeks of the 13 weeks of the qualifying period for the third quarter. There are four wage statements with dates in the qualifying period for the third quarter, each 2 weeks apart. It thus appears that the hearing officer was inconsistent in determining the number of weeks worked in the respective qualifying periods.

We cannot affirm the hearing officer's decision because statements made in the decision reflect an application of law inconsistent with prior Appeals Panel decisions applying Rule 130.102(d)(1). We cannot render a decision for the claimant because the hearing officer did not make an explicit finding that the claimant returned to work in a position relatively equal to her ability to work during the relevant qualifying periods, and given the ambiguity of her finding on that matter, we do not want to imply that finding. It is clear from the documented job searches on the claimant's TWCC-52s that the claimant did not document a job search for every week of the qualifying periods. However, there remains the question of whether the claimant met the requirements of Rule 130.102(d)(1). There is also an unresolved question regarding the inconsistent statements in the hearing officer's decision regarding the number of weeks worked in the respective qualifying periods. Accordingly, we reverse the hearing officer's decision and remand the case to the hearing officer for further consideration and development of the evidence pursuant to the authority granted to the Appeals Panel in Section 410.203(b)(3), and for further findings of fact, conclusions of law, and a decision on the issues of whether the claimant is entitled to SIBs for the second and third quarters. In addition, in the decision on remand, the hearing officer is to provide an explanation, based on the evidence, on whether the claimant met the requirement of Rule 130.102(d)(1).

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **TWIN CITY FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEMS
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

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Robert W. Potts
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Margaret L. Turner
Appeals Judge